



# American Public Gas Association

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EX PARTE

November 24, 2021

To: Emily Hammond  
Deputy General Counsel for Litigation, Regulation & Enforcement

From: John P. Gregg  
General Counsel

Re: Ex Parte Communication on Department of Energy Matters

*Energy Conservation Program: Energy Conservation Standards for Residential Furnaces and Commercial Water Heaters*

Docket Number EERE-2018-BT-STD-0018; RIN No. 1904-AE39

On November 23, 2021, Dave Schryver, Renee Lani, and I of the American Public Gas Association met virtually with Samuel Walsh, General Counsel of the Department of Energy and yourself. Also in attendance from Spire Inc. were Mark Darrell, Senior VP and General Counsel, and Barton Day, outside counsel.

We discussed matters concerning DOE's authority to effect appliance standards for natural gas equipment under the Energy Policy and Conservation Act of 1975 ("EPCA") and related legal issues, including those presented in DOE's Notice of Proposed Interpretative Rule – Energy Conservation Program for Appliance Standards: Energy Conservation Standards for Residential Furnaces and Commercial Water Heaters, Docket EERE-2018-BT-STD-0018. We requested that DOE preserve the final interpretive rule. We presented the attached PowerPoint presentation.

Please post this notice on the Department's ex parte web page and forward to the docket managers for inclusion in the dockets in the above noted proceedings.

If you require any additional information, please contact the undersigned.

Sincerely,

John P. Gregg  
General Counsel  
American Public Gas Association  
[jgregg@mccarter.com](mailto:jgregg@mccarter.com)

Attachment

# Meeting Regarding DOE Interpretive Rule November 23, 2021

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AMERICAN PUBLIC GAS ASSOCIATION  
SPIRE INC.

# DOE's Interpretive Rule Resolved a Long-Debated Issue of Statutory Construction

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- DOE had previously proposed efficiency standards for natural gas residential furnaces and commercial water heaters that would have limited the market to condensing products.
- Adverse comment argued that such standards were impermissible because they would result in the unavailability of atmospherically vented products.
- When DOE took no action, Spire, APGA with others filed a petition for rulemaking seeking to resolve that issue.
- After robust public engagement and lengthy deliberation, DOE:
  - Issued a final Interpretive Rule resolving the legal issue for the first time; and
  - Withdrew its proposed standards on the grounds that their adoption was precluded by the "Unavailability Provisions" of the statute.

# DOE's Proposed Reversal of the Interpretive Rule is Unwarranted

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- DOE now proposes to reverse its Interpretive Rule based on the arguments presented in its previous proposed rules.
- Despite:
  - Adverse comment in response to those proposals;
  - The record accumulated in support of the Interpretive Rule;
  - The absence of any new information or argument since the Interpretive Rule issued; and
  - The fact that – under the unavailability provisions of the statute – any purported factual issues would need to be revisited in the context of standards rulemaking.
- DOE is effectively treating an issue of fact and law as though it were a matter of policy preference and is creating legal error.

# The Ultimate Issue is Whether DOE Should Use Standards to Promote Electrification

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- Standards limiting the market to condensing products would do more to promote electrification than to promote the efficiency of gas products.
  - Condensing products are increasingly dominating the market where the economic justification for them is strong.
  - Condensing products have lower installed costs in some cases, but are not suitable for all installations.
  - In the latter cases, DOE recognized that its proposed standards would impose burdens that would cause many purchasers to replace gas products with electric alternatives; and
  - DOE justified those standards on the theory that such fuel switching would be economically beneficial for consumers.
- That's why electrification advocates support standards limiting the market to condensing products and we oppose them.

# This is Not a Policy Issue

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- We believe that a decision to impose standards limiting the market to condensing products would be a poor policy choice due to:
  - Probable increases in overall energy consumption and carbon emissions due to the inefficient production of electricity from fossil fuels;
  - Decreased resilience to impacts of climate change; and
  - Adverse impacts on low-income consumers.
- Nonetheless, DOE's policy discretion is constrained by statute:
  - Standards limiting the market for gas furnaces (and similar products) to condensing products would be inconsistent with EPCA's "Unavailability Provisions" and basic statutory scheme, creating legal error.

# The Material Facts are Clear

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- Most existing buildings were architecturally designed to accommodate atmospherically-vented gas products.
- Condensing products are not compatible with such buildings.
- If standards limit the market to condensing products, existing atmospherically vented products could not be replaced without the need to modify existing buildings to accommodate products for which they were not designed.
- There are many cases in which required modification would be impractical or would have undesirable impacts on occupied space or building exteriors.
- The unavailability of suitable gas products would cause many consumers to choose electric alternatives.

# Most Existing Buildings Were Designed for Atmospherically Vented Products

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- Appliance spaces are typically centrally located within the building footprint, typically below grade where possible.
- Combustion products are vented vertically through the roof.
- Through built-in metal vent systems that:
  - Operate at atmospheric pressure;
  - Commonly serve multiple appliances; and
  - In high-rise buildings, serve similar appliances in separate, vertically-stacked units.



# Condensing Products Are Not Compatible with Such Buildings

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- They cannot be served by the by the existing venting systems.
  - They require corrosion-proof (typically PVC) venting.
  - They must be vented individually at positive pressure.
- The location of building spaces designed for atmospherically-vented products are often inappropriate for condensing products.
  - Condensing products are designed to vent laterally through an exterior building wall, and lateral venting for centrally-located products would often run through currently occupied space.
  - Vent lengths or configurations often preclude vertical venting.

# Condensing Products Are Not Compatible with Such Buildings (continued)

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- Placement of exterior vent outlets is often problematic.
  - Sacrifices of window, balcony, or patio space may be required (particularly in row houses and multi-family housing).
  - Lateral venting may be incompatible with building aesthetics or prohibited by applicable building codes or restrictive covenants.
- Elimination of one commonly-vented product often makes venting problematic for other commonly-vented products.
  - Venting modifications for the other products are often required.
  - Premature replacement of the other products is often required.

# Condensing-Only Standards Would Cause Fuel Switching

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- Atmospherically vented products would be unavailable.
- Purchasers seeking to replace such products would be left without products compatible with their buildings.
- Required building modifications would often be:
  - Impractical;
  - Undesirable; or
  - Excessively costly.

# Arguments to the Contrary Are Specious

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- Claims that incompatibility problems don't exist or are rare:
  - Are based on misstatements of fact;
  - Do not recognize problems (such as the need to run venting through occupied space or relocate appliance spaces) as “problems,” or
  - Define “problems” narrowly based solely on out-of-pocket costs.
- Claims that there are easy solutions for incompatibility problems:
  - Falsely suggest that solutions of limited application are generally applicable;
  - Ignore the adverse impacts of the purported “solutions”; or
  - Treat fuel switching in response to the unavailability of suitable gas products as a “solution.”

# DOE's Proposals Relied on Fuel Switching to Economically Justify the Standards

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- DOE has recognized that the incompatibility of condensing products with existing buildings would cause consumers to switch to electric alternatives.
- DOE relied on a “fuel switching” analysis to:
  - Selectively exclude bad economic outcomes of investments in condensing products from its economic analysis; and
  - Substitute beneficial economic outcomes attributed to assumed investments in electric alternatives.
- This analysis did not show that *required efficiency improvements in products subject to the standards (e.g., gas furnaces) would be justified by energy savings they would provide.*
- Instead, it sought to show that burdensome requirements for products subject to the standard would benefit consumers by causing them to select alternative products.

# That Approach was Inconsistent with the Statutory Scheme

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- The statutory purpose of EPCA's appliance and equipment efficiency program is to conserve energy through improvements in the efficiency of the regulated products, not to promote electrification. 42 U.S.C. § 6201.
- Standards must be economically justified based on the costs and benefits of efficiency improvements *in the products subject to the standards*.
  - EPCA requires that *standards* be economically justified. 42 U.S.C. § 6295(o)(2)(A).
  - By energy savings resulting “directly” from the standard. 42 U.S.C. § 6295(o)(2)(B)(i)(III).
  - DOE must consider the economic impact of the standard on manufacturers and consumers “of the products subject to such standard.” 42 U.S.C. § 6295(o)(2)(B)(i)(I).
  - DOE must compare the increase in the initial cost of more efficient products subject to the standards with the operating cost savings improved efficiency would provide over the life of those products. 42 U.S.C. § 6295(o)(2)(B)(i)(II).

# The Proposals Were Inconsistent with EPCA's “Unavailability” Provisions

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- EPCA precludes standards that would result in the unavailability “in any covered product type (or class) of performance characteristics (including reliability), features, sizes, capacities, and volumes” that are currently available to consumers. 40 C.F.R. §§ 6295(o)(4); 6313(a)(6)(B)(iii)(II)(aa).
- The “Unavailability Provisions” were designed to ensure that even economically justifiable standards achieve energy savings “without sacrificing the utility or convenience of appliances to consumers.” H.R. Rep. No. 100-11 at 22-23 (1987).
- Among other things, these provisions were specifically intended to preserve the availability of products that “fit in standard building spaces” built into existing homes. H.R. Rep. No. 100-11 at 22-23 (1987).

# Arguments to the Contrary Are Specious

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- DOE may not ignore these constraints on its rulemaking authority by claiming that they conflict with EPCA's purposes.
- There is no basis to suggest that the "Unavailability Provisions" do not protect installation-related product characteristics. Otherwise:
  - The "Unavailability Provisions" would not preserve the availability of products that “fit in standard building spaces” as Congress intended;
  - Separate product classes for “space constrained” products would not be justified; and
  - EPCA would not provide three separate product classes for direct heating equipment based solely on differences in the manner of their installation.



# Arguments to the Contrary Are Specious (continued)

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- There is no basis to suggest that the burdens imposed by the unavailability of atmospherically vented products can be addressed as a justifiable cost.
  - The need for undesired building modifications is not just a matter of out-of-pocket cost.
  - The costs are not the type appropriately considered for purposes of economic justification (*e.g.*, the cost of replacing *a water heater* is not an “initial charge[] for” *for a furnace*).
  - The "Unavailability Provisions" require that product characteristics be preserved even if costs imposed by their unavailability would be economically justified.
- There is no basis to suggest that the "Unavailability Provisions" do not apply if gas products of similar function (or if electric alternatives) are available.
  - The statute refers to unavailability of a subset of products “in any covered product type (or class),” not the unavailability of an entire product class.
  - Separate product classes are required for products that perform the same function but use a different type of fuel. 42 U.S.C. § 6295(q)(1)(A).

# Arguments to the Contrary Are Specious (continued)

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- The “Unavailability Provisions” do not “lock in” technology; they ensure that standards do not result in the unavailability of features or characteristics that consumers want or need.
- Preserving the availability of atmospherically vented products would not establish a “ceiling for product efficiency,” nor “eliminate DOE’s ability to address technological advances.”
  - DOE can use separate product classes to establish more stringent standards for other products as appropriate;
  - If technological advances enable atmospherically vented products to achieve higher efficiency, more stringent standards for those products may be warranted.

# Condensing-Only Standards Cannot Be Economically Justified as EPCA Requires

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- Instead of showing that *the required efficiency improvements in products subject to the standards would be justified by energy savings they would provide*, DOE used a fuel switching analysis to argue that requirements for *economically unjustified efficiency improvements would benefit consumers*.
- Although DOE's analysis assumed that decisions to switch to electric alternatives would be driven by economic considerations, it assumed that decisions to purchase gas products *never* are.
  - DOE ignored evidence that purchasers acting in the absence of new standards have a strong tendency to make economically beneficial investments in condensing products (and decline "bad" investments).
  - Over half the total regulatory benefits claimed in the furnace rulemaking were from cases in which condensing products *would have lower installed costs*.

# Conclusions

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- Standards limiting the market to condensing products:
  - Would violate EPCA by making atmospherically vented products unavailable;
  - For the unauthorized purpose of promoting the replacement of gas products instead of conserving energy by improving their efficiency; and
  - Cannot be economically justified – as EPCA requires – on the basis of the energy savings improvements in the efficiency of products subject to the standards would provide.
- While policy considerations cannot alter the facts or the law, such standards:
  - Are likely to increase overall energy consumption and carbon emissions; and
  - Would have disproportionate adverse impacts on low-income consumers.